

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

B.P.J., by her next friend and mother, HEATHER JACKSON,

Plaintiff,

v.

WEST VIRGINIA STATE BOARD OF EDUCATION, HARRISON COUNTY BOARD OF EDUCATION, WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION, W. CLAYTON BURCH in his official capacity as State Superintendent, and DORA STUTLER in her official capacity as Harrison County Superintendent,

Defendants.

Civil Action No. 2:21-cv-00316

Hon.

DECLARATION OF LOREE STARK

I, Loree Stark, declare under penalty of perjury of the laws of the United States of America that the following is true and correct, and state:

1. I am the Legal Director of the ACLU of West Virginia, counsel of record for Plaintiff B.P.J, with her next friend and mother, Heather Jackson. The following is true of my own personal knowledge, and, if called as a witness, I would and could testify competently thereto.

2. As set forth below, I have reviewed audio recordings and transcript excerpts of the West Virginia Legislature's testimony regarding H.B. 3293. Each excerpt that I reviewed is accurately described in the respective Exhibit using the timestamp of testimony as available on the West Virginia Legislature's public recordings, or in the audio files provided below. I have also provided hyperlinks where the recordings are available for review. As of the date of this filing, each of the hyperlinks is in working order.

3. Attached hereto as Exhibit A is a true and correct copy of the enacted version of H.B. 3293 (codified at § 18-2-25d). The bill's text can also be accessed on the West Virginia Legislature's website at:

https://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=HB3293%20SUB%20ENR.htm&yr=2021&sesstype=RS&i=3293.

4. Attached hereto as Exhibit B is a true and correct transcription of excerpts from testimony heard during the West Virginia House of Delegates Education Committee Meeting on or around March 18, 2021. A recording of the testimony is available for download at:

<https://liquidfiles.cooley.com/link/02OaNUDHjag73hII87u1bQ> (last accessed May 21, 2021).

5. Attached hereto as Exhibit C is a true and correct transcription of excerpts from testimony heard during the West Virginia House of Delegates Judiciary Committee Meeting on or around March 18, 2021. A recording of the testimony is available at:

<https://liquidfiles.cooley.com/link/IBA66jDquGj5EM04cqf2Q> (last accessed May 21, 2021).

6. Attached hereto as Exhibit D is a true and correct transcription of excerpts from testimony heard during the West Virginia House of Delegates Hearing on or around March 25, 2021. A recording of the testimony is available at:

https://www.youtube.com/watch?app=desktop&v=af_ikMx-PJU (last accessed May 21, 2021).

7. Attached hereto as Exhibit E is a true and correct transcription of excerpts from testimony heard during the West Virginia Senate Hearing on or around April 8, 2021. A recording of the testimony is available at: <http://bit.ly/3bWYZVf> (accessed May 21, 2021).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on May 26, 2021

/s/ Loree Stark

Loree Stark, Esq.

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Hon.

CERTIFICATE OF SERVICE

I, Loree Stark, do hereby certify that on this 26th day of May, 2021, I electronically filed a true and exact copy of the ***Declaration of Loree Stark*** with the Clerk of Court and all parties using the CM/ECF System. A copy of this declaration will also be served to the Defendants with the Complaint.

/s/ Loree Stark

West Virginia Bar No. 12936

EXHIBIT A

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

ENROLLED

Committee Substitute

for

House Bill 3293

BY DELEGATES HANNA, BRIDGES, CLARK, ELLINGTON,

HORST, JENNINGS, LONGANACRE, MAZZOCCHI, TULLY,

PHILLIPS AND BURKHAMMER

[Passed April 9, 2021; in effect ninety days from

passage.]

Enr CS for HB 3293

1 AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section,
2 designated §18-2-25d, relating to designation of athletic teams or sports sponsored by
3 any public secondary school or state institution of higher education according to biological
4 sex; providing legislative findings; defining "biological sex", "female", and "male"; providing
5 for designation of athletic teams as "males, men, or boys", "females, women, or girls", or
6 "coed or mixed"; prohibiting biological males from participating on athletic teams or sports
7 designated for biological females where competitive skill or contact is involved; clarifying
8 that eligibility of any student to participate on athletic teams or sports designated for
9 biological males is not restricted; providing cause of action for student aggrieved by
10 violation of this section; requiring identity of minor student related to such action to remain
11 anonymous; requiring promulgation of rules by the State Board of Education; and requiring
12 proposal of legislative rules by the Higher Education Policy Commission and Council for
13 Community and Technical College Education.

Be it enacted by the Legislature of West Virginia:

ARTICLE 2. STATE BOARD OF EDUCATION.

**§18-2-25d. Clarifying participation for sports events to be based on biological sex of the
athlete at birth.**

1 (a) The Legislature hereby finds:
2 (1) There are inherent differences between biological males and biological females, and
3 that these differences are cause for celebration, as determined by the Supreme Court of the
4 United States in *United States v. Virginia* (1996);
5 (2) These inherent differences are not a valid justification for sex-based classifications that
6 make overbroad generalizations or perpetuate the legal, social, and economic inferiority of either
7 sex. Rather, these inherent differences are a valid justification for sex-based classifications when
8 they realistically reflect the fact that the sexes are not similarly situated in certain circumstances,
9 as recognized by the Supreme Court of the United States in *Michael M. v. Sonoma County*,

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10 *Superior Court* (1981) and the Supreme Court of Appeals of West Virginia in *Israel v. Secondary*
11 *Schools Act. Com'n* (1989);

12 (3) In the context of sports involving competitive skill or contact, biological males and
13 biological females are not in fact similarly situated. Biological males would displace females to a
14 substantial extent if permitted to compete on teams designated for biological females, as
15 recognized in *Clark v. Ariz. Interscholastic Ass'n* (9th Cir. 1982);

16 (4) Although necessarily related, as concluded by the United States Supreme Court in
17 *Bostock v. Clayton County* (2020), gender identity is separate and distinct from biological sex to
18 the extent that an individual's biological sex is not determinative or indicative of the individual's
19 gender identity. Classifications based on gender identity serve no legitimate relationship to the
20 State of West Virginia's interest in promoting equal athletic opportunities for the female sex; and

21 (5) Classification of teams according to biological sex is necessary to promote equal
22 athletic opportunities for the female sex.

23 (b) Definitions. - As used in this section, the following words have the meanings ascribed
24 to them unless the context clearly implies a different meaning:

25 (1) "Biological sex" means an individual's physical form as a male or female based solely
26 on the individual's reproductive biology and genetics at birth.

27 (2) "Female" means an individual whose biological sex determined at birth is female. As
28 used in this section, "women" or "girls" refers to biological females.

29 (3) "Male" means an individual whose biological sex determined at birth is male. As used
30 in this section, "men" or "boys" refers to biological males.

31 (c) Designation of Athletic Teams. —

32 (1) Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are
33 sponsored by any public secondary school or a state institution of higher education, including a
34 state institution that is a member of the National Collegiate Athletic Association (NCAA), National

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35 Association of Intercollegiate Athletics (NAIA), or National Junior College Athletic Association
36 (NJCAA), shall be expressly designated as one of the following based on biological sex:

37 (A) Males, men, or boys;

38 (B) Females, women, or girls; or

39 (C) Coed or mixed.

40 (2) Athletic teams or sports designated for females, women, or girls shall not be open to
41 students of the male sex where selection for such teams is based upon competitive skill or the
42 activity involved is a contact sport.

43 (3) Nothing in this section shall be construed to restrict the eligibility of any student to
44 participate in any interscholastic, intercollegiate, or intramural athletic teams or sports designated
45 as "males," "men," or "boys" or designated as "coed" or "mixed": *Provided*, That selection for a
46 team may still be based on those who try out and possess the requisite skill to make the team.

47 (d) Cause of Action. —

48 (1) Any student aggrieved by a violation of this section may bring an action against a
49 county board of education or state institution of higher education alleged to be responsible for the
50 alleged violation. The aggrieved student may seek injunctive relief and actual damages, as well
51 as reasonable attorney's fee and court costs, if the student substantially prevails.

52 (2) In any private action brought pursuant to this section, the identity of a minor student
53 shall remain private and anonymous.

54 (e) The State Board of Education shall promulgate rules, including emergency rules,
55 pursuant to §29A-3B-1 *et. seq.* of this code to implement the provisions of this section. The Higher
56 Education Policy Commission and the Council for Community and Technical College Education
57 shall promulgate emergency rules and propose rules for legislative approval pursuant to §29A-
58 3A-1 *et. seq.* of this code to implement the provisions of this section.

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The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

.....
Chairman, House Committee

.....
Chairman, Senate Committee

Originating in the House.

In effect ninety days from passage.

.....
Clerk of the House of Delegates

.....
Clerk of the Senate

.....
Speaker of the House of Delegates

.....
President of the Senate

.....
The within this the
day of, 2021.

.....
Governor

EXHIBIT B

West Virginia House of Delegates Education Committee

DATE: Thursday, March 18, 2021

MEMBERS: Chairman Ellington, Vice-Chairman Higginbotham, Minority Chair Hornbuckle, Minority Vice-Chair Thompson, Delegates Bridges, Clark, Doyle, Evans, Griffith, Hamrick, Hanna, Horst, Jennings, Kelly, J., Kessinger, Kimble, Longanacre, Martin, Mazzocchi, Smith, Statler, Toney, Tully, Walker, Wamsley

Excerpts of testimony on House Bill 3293:

| Time Stamp | Testimony |
|-------------------|--|
| 00:17:46-18:31 | <p>[Delegate Evans]: I believe there definitely are. I stood on the football field this year against a team that definitely had a girl on the football field. We went to Webster County at one time, Webster County had a kicker female. So, I guess it is true that girls can play male sports.</p> <p>[Counsel representing H.B. 3293]: Yes.</p> <p>[Delegate Evans]: But males cannot play female sports?</p> <p>[Counsel representing H.B. 3293]: That's currently the way, the current law-</p> <p>[Delegate Evans]: So how does this, how does this bill then affect them, or does it affect it at all?</p> <p>[Counsel representing H.B. 3293]: This bill would affect those that changed their sex after birth.</p> <p>[Delegate Evans]: Okay. So it has nothing to do with current sex or like, like I'm a guy, I'm not going to change that. So it would not affect me?</p> <p>[Counsel representing H.B. 3293] It would not affect you.</p> |
| 00:22:00-00:22:20 | [Delegate Thompson]: Okay. Has, has your office received calls, concerns, complaints regarding anything remotely related to this |

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| | <p>about students participating in, in sports or extracurricular activities that you know, that they're...?</p> <p>[Sarah Stewart, West Virginia Department of Education]: Surrounding the conversation today, no, we have not.</p> |
| 00:26:46-00:27:18 | <p>[Delegate Walker]: Can you tell me if any trans women have dominated any sporting events?</p> <p>[Andrew Schneider, Executive Director of Fairness West Virginia]: Not one athlete who has transitioned has been successful at the highest levels of sport. The lack of success is a strong indication of the fairness of permitting transgender women to compete against cisgender women. In fact, the problem with these bills is that they, they say that all bills, all boys are stronger than all girls. And that is just incorrect.</p> |

EXHIBIT C

West Virginia House of Delegates Judiciary Committee

DATE: Thursday, March 18, 2021

MEMBERS: Chairman Capito, Vice-Chair Fast, Delegates Lovejoy, Brown, Bruce, Burkhammer, Fluharty, Garcia, Haynes, Keaton, Kelly, D., Kessinger, Kimble McGeehan, Nestor, Pack, L., Phillips, Pinson, Pritt, Pushkin, Queen, Ward, B., Westfall, Zatezalo, Zukoff

Excerpts of testimony on House Bill 3293:

| Time Stamp | Testimony |
|-------------|--|
| 03:11-03:27 | <p>[Delegate Zukoff]: Okay. Have we had this come up before the Department of Education? Have we had any issues around this, this bill that, transgender students participating in sports come before the Department of Education as a concern?</p> <p>[Counsel representing H.B. 3293]: It is my understanding that there have been no problems on the county level.</p> |
| 23:10-23:21 | <p>[Delegate Pushkin]: Okay. Have you, there was asked of Counsel and, and she didn't know of anybody. Do, do you know of any cases in West Virginia?</p> <p>[Cathryn Oakley, State Legislative Director and Senior Counsel at the Human Rights Campaign]: I do not know of any cases in West Virginia.</p> |
| 27:24-28:00 | <p>[Cathryn Oakley]: The rhetoric around those bills can be extremely harmful to transgender youth who are hearing them at home.</p> <p>[Delegate Pushkin]: So even though it's unlikely that, that there's going to be participation from transgender girls in sports because we haven't seen it in a whole lot of places, the bill itself could be harmful just for a group that's already extremely alienated, is what you're saying, right?</p> <p>[Cathryn Oakley]: That's exactly what I'm saying. It's that there's actually no harm here that's being addressed by a piece of legislation like this . . . But there is harm perpetrated by it.</p> |

EXHIBIT D

West Virginia House of Delegates

DATE: Thursday, March 25, 2021

SPEAKERS REFERENCED: Speaker Hanshaw, Clerk Harrison, Delegates Fluharty, Ellington, Garcia, Walker, Mazzochi

HOUSE ROSTER: <https://www.wvlegislature.gov/house/roster.cfm>

Excerpts of testimony on House Bill 3293:

| Time Stamp | Testimony |
|-------------------|--|
| 03:04:56-03:05:19 | <p>[Delegate Fluharty]: So, you know, you've heard, I'm sure you took some testimony up there in committee. Have you had, did you have any testimony of the number of complaints that SSAC has received regarding anybody taking advantage of the single-sex sport system we currently have?</p> <p>[Delegate Ellington]: Not in West Virginia.</p> <p>[Delegate Fluharty]: So not a single complaint received in West Virginia?</p> <p>[Delegate Ellington]: Not at this point in time.</p> |
| 03:17:52-03:18:58 | <p>[Delegate Garcia]: Thank you Mr. Speaker. Each of us, when we put our name on the ballot, first question we were asked is, why do you want to go to Charleston? I didn't come to Charleston to create problems where they don't exist. We've heard that there's no complaints about this in the state of West Virginia, about this issue about some type of advantage, competitive advantage that, that individuals, that kids are making this decision just so they can do better at sports. That's not happening. But we are creating a problem. And I, I've talked to a lot of people, and last week was, was talking to somebody about infrastructure and they said, "Infrastructure, who cares? How can I stay in a state like West Virginia when you pass bills like this? When you take up bills like this? How can we get our young people to stay, and how can we ever attract somebody to our state?"</p> |
| 03:26:32-03:31:33 | <p>[Delegate Walker]: Thank you. I appreciate it. Colleagues. We just debated. Freedom. [inaudible 03:26:49] Same difference. I'm not the parent. I don't have a child who is transgender. And not all of us practice the same religion. And we need to be mindful of that while we share our truths,</p> |

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| | <p>respectfully. But what is so disheartening about this bill is that a child can play a sport until they get to secondary education, where their classmates may not see their differences at all. Where that child may not have been bullied before, we're opening up an opportunity.</p> <p>This flag sits on my desk for all the children and adults who are thankful to be alive, and for those who have died. Transgender people, especially transgender black people, are killed at high numbers. If we're going to talk about the rules and the respect and the good book, let's think about those individuals. If we're going to pass judgment, and this is your truth and this is your conviction, what are we saying to the children? This is not about adults. These, this is about children. Those numbers couldn't be answered but I have them. 1.0% of West Virginians at age 13 to 17 years old identify as transgender. 1%. That's 1% that we're not going to allow in team sports, while we build team leadership and we build a bond. And we build athleticism, and we tell them right here, at secondary education, "You don't matter. You're not good enough."</p> <p>Once again, I have to go back to when I went through my first year of being here. Cause we had a lot of truths today, and it shakes my soul. You called them butch, you called them the F word. You called them creatures, you called them a disgrace of God. You called them demons, you called them the devil. Well guess what I call them? Love.</p> <p>I call them children. I call them future leaders. I call them trendsetters. I call them change makers. I call them to lead. I call them to use their voices. I call them to speak their pain. And I sit, uncomfortable in those moments, so they can have their own movement. Who is this bill helping, and who is it hurting? West Virginia, a place to live, work, raise a family if you choose, only if you're not transgender. Thank you, Mr. Speaker Pro-Tem.</p> |
| 04:01:48-04:03:40 | <p>[Delegate Mazzochi]: Thank you Speaker of Pro-Tem. This is not about freedom. This is about protection. To protect our little girls that are in school. I don't mind everybody playing together in a league. If there are the parents there and everybody, the parents can take, can take care of their children, can watch them. That is all beautiful. But in school at that age when they start at what? 11 or 12, 13, they are at a very important age. And they feel very, as a girl, they feel</p> |

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| | <p>very conscious about their bodies. Not to say that those transgender children are not, but to be honest, I don't want all this mixing and matching and whatever in our, in these locker rooms, I'm sorry.</p> <p>The, there is no adult there to supervise. I don't want all this, this, this, whatever you're saying there. You're making a big problem out of nothing. I am sorry. This is not—we have boys and we have girls and we have some that are somewhere in between, and it's a very small minority. And why are we making this a big, huge deal? It is not a big, huge deal that everybody can play in a league. If you have ever played soccer, and I'm telling you, we have our, my family brought soccer into Logan County and my little girl played with the boys and played against the boys.</p> |
| 04:19:33-04:20:26 | <p>[Delegate Ellington]: Thank you, Mr. Speaker. This issue came to the surface in the United States regarding transgenders a few years ago, when two transgender girls were allowed to compete in state track and field meets in Connecticut. They won a combined 15 girls' state indoor and outdoor championship races from 2017 to '19. That's one of the things that started the national debate. As I mentioned, there are 27 states that have put in legislation regarding this. And yes, there are 17 states and the District of Columbia that require inclusion. However, there are six states that have no policy regarding gender identity, or sports, regarding sports whatsoever, and we're one of those.</p> |

EXHIBIT E

West Virginia Senate

DATE: Thursday, April 8, 2021

SPEAKERS REFERENCED: Senators Romano, Stollings, Maroney, Roberts

SENATE ROSTER: <https://www.wvlegislature.gov/Senate1/roster.cfm>

Excerpts of Testimony on House Bill 3293:

| Time Stamp | Testimony |
|-------------------|--|
| 12:42:27-12:43:01 | [Senator Romano]: Well Senator, this isn't about opportunity for girls to play without interference from boys 'cause we've never had one of those cases. We've never had any boy try to play on a girls' team. The—the question is, how would you have felt when you were a tomboy growing up if somebody had challenged your gender, what would that have done to your self-esteem, what would that have done to your psychological outlook because there's nothing in this bill that says it has to be a serious concern, it just says that you have a cause of action if you've been aggrieved by a violation. |
| 01:06:07-01:09:16 | [Senator Stollings]: Thank you, Mr. President. I'm not sure if this body is concerned about what this bill does or could do to a transgender person in West Virginia. But the West Virginia State Medical Association, the West Virginia Chapter of the American Academy of Pediatrics, the West Virginia Psychological Association and the West Virginia School Psychologist Association and the American Academy of Pediatrics on a national level are very concerned about what this would do to a transgender person, student, in West Virginia. They say many trans youth already face an uphill battle in nearly every part of their lives. 84% of transgender youth feel unsafe at school. Nearly half trans youth attempt suicide, think about that. And the trans community is increasingly the target of violence and harassment. This bill will further ostracize young transgender people from their peers. The West Virginia Chapter of the American Academy of Pediatrics opposes House Bill 3293. Their organization works toward all children and adolescents regardless of gender identity or expression. |

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| | <p>Receiving care to promote optimal physical, mental and social wellbeing. Any discrimination based on gender identity or expression damages the socio-emotional health of children, families and society. Again, transgender youth in West Virginia are high at risk—higher risk of suicide than their cisgender peers and this bill will only further the discrimination transgender youth experience. They again ask us to reject this—this bill. Transgender already face higher risk of suicide and depression and again it would further harm too many of West Virginia's most vulnerable.</p> <p>So whether we are concerned about the unintended consequences of this bill, the people that are specialists and people that are on the frontline clearly, clearly have an issue. So it is with that regard and the fact that I think the SSAC does cover and does have a policy, should this ever become an issue. So we're creating legislation for a problem that doesn't exist and it does have unintended negative consequences. I urge a no-vote.</p> |
| 01:36:54-01:37:13 | [Senator Maroney]: Thank you Mr. President. This bill has nothing to do with gay people or those that are gay, and to imply that is, I think, misleading. The bill, the bill it talks about, it's about transgenders. It's about, there's a safety issue involved here in sports. |
| 01:50:18-01:51:59 | [Senator Roberts]: Thank you, Mr. President. I think that the narrative shifts around from the actual bill itself. The bill is designed to protect girls in women's sports. It is not something that is designed to hurt people, it's designed to protect people. I received a couple of emails that kind of lay it out and people should understand. These are actually both from Raleigh County. The first one says, "I am a lesbian in favor of the sports bill. Dear West Virginia legislators. I am a US citizen originally from the Philippines, living in West Virginia with my wife and child. I am urging you today to vote for the sports bill and uphold one aspect of what it is to be born female." There are too many groups on both sides of the aisle, trying to politicize a subject that should be 100% science and common sense. Due to the trans movement, what it is to be a female and to be safe in |

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| | <p>this country is being erased. The entire trans movement is an attack upon womanhood. I urge you to save our young women from allowing biological males into sports locker rooms, et cetera with our girls.”</p> |
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